

DATO' SERI PEH TECK QUEE

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v.

TETUAN KUMAR JASPAL QUAH & AISHAH

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL WAHAB PATAIL J

[SUIT NO: S3-24-171-2002]

24 MARCH 2003

LEGAL PROFESSION: *Remuneration - Bill of costs - Taxation - Reference for taxation made more than one year after delivery of bill - Absence of reason for delay - Absence of special circumstances - Whether application to be dismissed - Legal Profession Act 1976, s. 128(1)*

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CIVIL PROCEDURE: *Summary judgment - Triable issue - Statements in affidavits - Whether to be supported by indication of likely evidence - Rules of the High Court 1980, O. 14*

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The plaintiff, a client of the legal firm defendant, had appealed against the decision of the learned Senior Assistant Registrar ('SAR') granting summary judgment to the defendant in respect of a claim for legal costs amounting to RM1,059,275.70. Having filed the appeal, and in any case more than one year after the bill of costs had been served on him, the plaintiff applied to refer the said bill to the registrar for taxation pursuant to s. 128(1) Legal Profession Act 1976 ('the Act'). The facts showed however that the main issue of fact arising in both the appeal and the present application was identical, namely whether the bill of costs was delivered to the plaintiff on 8 December 2000, or in early March 2001 as asserted by the plaintiff, and that being so, the learned judge took the liberty to hear the appeal and the application together. The issue of fact apart, the plaintiff had not however shown any evidence of overcharging by the defendant. In the circumstances, before the learned judge, upon the affidavit evidence as were made available to the court by the parties, questions arose as to: (i) whether the plaintiff had raised a triable issue in respect of the appeal; and (ii) whether special circumstances existed as would justify reference of the bill of costs to the registrar.

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a **Held:**

- b* [1] On their own, the statements of the plaintiff in his affidavits in this case and in the appeal are no better or worse than the statements in the affidavits of Dato' Vijay Kumar for the defendant. It thus cannot be said in such a case that the plaintiff in this case has succeeded to show that the defendant plainly and obviously has no defence. Similarly, the defendant, as plaintiff in the Order 14 application under appeal, cannot say that they have made out a plain and obvious case upon their statements in the affidavit. (p 36 d-e)
- c* [1a] However, the statement by Dato' Vijay Kumar that the bill of costs was served on the plaintiff on 8 December 2000 at 4.21pm was based upon a record in the relevant file, and was supported by the statutory declaration of Ho Kok Yew, the person who served the bill of costs on the plaintiff. On the other hand, the relevant affidavit of the plaintiff
- d* offered no such support. By his affidavit the plaintiff only disagreed with the defendant's version, without showing who or what he could or would rely to support his version. The plaintiff, hence, has failed to show that he had any kind of evidence against which the defendant's version could be tested and measured. (p 36 f-h)
- e* [2] The plaintiff has had notice since 6 November 2001 that it is the defendant's case that the bill of costs had been served on him on 8 December 2000. That this application under s. 128(1) of the Act was filed only after one year had expired, *ie*, after 8 December 2001, necessitated the plaintiff to give credible support to his statement in order
- f* to make out his case that there is a triable issue on the question of the date of service of the bill of costs. (p 37 d-e)
- [3] Even assuming that the bill of costs was served in March 2001, s. 128(1) requires that after the expiration of 6 months from the delivery of the bill of costs, the applicant must prove that there are special circumstances
- g* to refer the bill to taxation. (p 37 f)
- [3a] Overcharging is always a special circumstance. However, no evidence was adduced by the plaintiff to prove that the defendant was guilty of any overcharging. Although the sum in the bill was substantial, the matter
- h* involved was also very substantial. The plaintiff, thus, had not shown why the bill should be very much less. (p 37 g-i)
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[3b] The plaintiff had also failed to give satisfactory reason as to why he was unable to apply within six months for the bill of costs to be taxed. Thus, even if it was accepted that the bill of costs was served in March 2001, the plaintiff's application must still fail. (p 38 c-d) a

[4] The plaintiff, while alleging backdating, has failed to set out who or what could provide evidence of it. In so failing, he has failed to make out that the issue of backdating is worthy of judicial investigation. (p 37 c) b

[5] In the summary judgment application, the onus to prove that the bill was served on 8 December 2000 was upon the defendant, as plaintiff therein. To that end, the defendant had shown that it has the evidence of written records and of the persons involved to prove that the bill of costs was served on 8 December 2000 at 4.21pm. On the other hand, the assertion by the plaintiff was only a mere assertion with no indication of likely evidence to warrant a judicial investigation by way of a trial. It is obvious that a trial would serve no useful purpose except to delay judgment. (p 38 e-f) c
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[Application under s. 128(1) of Act and appeal from SAR's decision dismissed.]

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA (**fol**) e

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC (**fol**)

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 PC (**refd**)

In re Boycott [1885] 29 Ch D 571 (**fol**) f

Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co [1995] 3 CLJ 234 HC (**refd**)

Re Robinson [1867] 3 LR 4 (**refd**)

Legislation referred to:

Legal Profession Act 1976, s. 128(1), (2) g

Rules of the High Court 1980, O. 14

For the plaintiff - K Ramesh; M/s Chellam Wong

For the defendant - V Ravindran; M/s Kumar Jaspal Quah & Aishah

Reported by WA Sharif h

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*a***JUDGMENT****Abdul Wahab Patail J:**

The plaintiff Dato' Seri Peh Teck Quee was a client of the defendant Tetuan Kumar, Jaspal Quah & Aishah, a firm of advocates and solicitors.

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The originating summons S3-24-171-2002 before this court (the present application) was filed on 4 April 2002 by the plaintiff for an order under s. 128(1) of the Legal Profession Act 1976 (Act 166) that the defendant's bill of costs dated 17 November 2000 for legal costs amounting to RM1,059,275.70 be referred to the registrar to be taxed although more than six months has passed after it was sent to the plaintiff. Whether it was more than six months or more than 12 months is also at issue in view of s. 128(2).

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The court was informed by Mr. V. Ravindran, counsel for the defendant, at the commencement of the hearing of the present application, that similar issues of fact were dealt in their application under O. 14 of the Rules of the High Court 1980 in D3-22-315-2002 in their claim for the legal costs of RM1,059,275.70, and they had obtained judgment before the senior assistant registrar. It was submitted that in the circumstances, the present application before the court could not proceed. Otherwise there is danger that two courts may arrive at different findings of fact. Counsel for the defendant suggested that the hearing of the application before this court be stayed.

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Mr K. Ramesh, counsel for the plaintiff informed the court that they had filed an appeal, and wanted to proceed with the present hearing; or at least that it be stayed until disposal of their appeal against the O. 14 judgment.

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Since (a) an appeal from the decision of a senior assistant registrar to a judge in chambers is in any case a rehearing before the judge in chambers, and (b) hearing the appeal from the senior assistant registrar and the application before this court together would (i) place all the evidence before one court and obviate or avert the undesirable occasion of two courts arriving at different findings of fact, which becomes possible if different sets of evidence are inadvertently presented, (ii) enable both the appeal and the present application to be placed and disposed off together even in the event of a further appeal, and (iii) enable the parties to have a more timely and economical resolution of the dispute; I had ordered that (a) the application to be stood down 30 minutes for the relevant file to be found, and (b) the appeal to be brought before the court and consolidated with the current application.

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When the hearing resumed with the appeal before me, Mr. V. Ravindran, counsel for the defendant, objected to the appeal and the current application being heard together. Mr. K. Ramesh, counsel for the plaintiff had no objections.

Since factual matters are entirely identical, and written submissions were provided before the senior assistant registrar in the application under appeal, I had proceeded with hearing of (a) the appeal upon the basis of the written submissions filed in D3-22-315-2002, and (b) the present application on the basis of written submissions filed for the hearing. I dealt with both matters together under S3-24-171-2002.

The issue of fact requiring a finding in both the application under appeal and in the present application is identical: whether the bill of costs was delivered to the plaintiff on 8 December 2000, or as is asserted by the plaintiff it was delivered sometime in early March 2001.

Submissions For The Plaintiff

Mr. K. Ramesh submitted as follows. Dato' Vijay Kumar, deposing an affidavit for the defendant firm on 4 March 2002 (see encl. 3), affirmed that according to the records in his possession the bill was served on 8 December 2000 at 4.21pm. He exhibited a statutory declaration of Mr. Ho Kok Yew made on March 2002 wherein the latter said he remembered serving a copy of bill of costs on file TQP.50092.V.hky.ml dated 17 November 2000 to Dato' Peh Teck Quee in the latter's office at Mercury Industries Berhad, at 7th Floor, Menara Promet, Jalan Sultan Ismail, Kuala Lumpur together with a covering letter. (See paras. 5, 6 and 7 of exh. VKN1 in affidavit of Dato' Vijay Kumar at encl. 3). He deposed that since the plaintiff refused to acknowledge receipt, he had left the bill and the form of acknowledgment with the plaintiff. He admitted that at first he could not remember, but after inspection of the records, in particular the note on the right of the copy of the bill of costs in the file, in the handwriting of his secretary then, Cik Kasthuri a/p Rajoo, and upon his own knowledge that his secretary would only enter such a note upon his instruction, he inferred that he had in fact served the bill of costs upon the plaintiff on 8 December 2000 at 4.21pm.

It was submitted by Mr. K. Ramesh that Ho Kok Yew could not remember, and could only do so after he had seen the notes of Cik Kasthuri who recorded it in the file on his instructions. He objected there was no affidavit by Cik Kasthuri or Ho Kok Yew. The issue Mr. K. Ramesh raised is whether there is enough evidence that the bill was served on 8 December 2000 at 4.21pm as asserted by Dato' Vijay Kumar. He submitted there is no evidence to prove that the bill was delivered on 8 December 2000. On the other hand, he

a submitted that the plaintiff, Dato' Seri Peh Teck Quee, in his affidavit of 14 January 2002 deposed in the present application, said it was sent to him in early March 2001 by one Ho Kok Yew of the defendant firm. This then is the fact in issue in both the O. 14 application under appeal as well as in the present application.

b Whether the fact in issue is a triable issue is the question that this court must answer in both cases. What is a triable issue has been dealt with authoritatively in the following cases.

The Law

c In *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457, 470-471 CA, the Court of Appeal had this to say with regard to an O. 14 application filed by the plaintiff:

d In a nutshell, in an application under Order 14 made by the plaintiff for summary judgement without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgement should be entered in the plaintiff's favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation

e in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgement should be refused. These general principles are also applicable to a counter-claim by a defendant against the plaintiff in the same civil action when an application is made under Order 14 rule 5.

f The onus upon a plaintiff in an application based upon affidavits is to satisfy the court that the defendant plainly and obviously has no defence. The defendant defeats that by showing there is a triable issue. The question is not whether there are in law defences available, but whether the defendant himself has a defence. Whether or not he has a defence is determined whether there are facts asserted that provide him with a defence. It is not enough to simply assert a very contradictory or conflicting fact, but he must indicate the nature of the evidence he could rely upon to support the contradictory or conflicting fact he has asserted. Only upon an examination of the nature of the evidence so indicated could the court decide whether there is an issue worthy of judicial

g investigation, ie, a triable issue. The court must consider if the assertion, denial or dispute is equivocal, lacks precision or is inconsistent with previous statements or documents, or is inherently improbable. If so, the court must reject the assertion, denial or dispute.

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In *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 the decision of the then Supreme Court, Mohamed Azmi SCJ writing for the majority succinctly explained the nature of a triable issue as follows:

Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.* In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 had this to say at p. 217:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, **this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation,** every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

His Lordship Mohamed Azmi SCJ cited and applied the speech of Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212, and said:

In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. **The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.**

Although these cases were applications under O. 14, the rule applied is applicable in all applications heard upon affidavit evidence. In *Bank Negara Malaysia v. Mohd Ismail & Ors*. his Lordship Mohamed Azmi SCJ held:

- a* Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

- b* The rule applicable in all applications involving affidavit evidence is that not every apparent conflict of assertions of facts necessarily raises a triable issue. The conflict must obviously be relevant. But it must also be shown to be a serious conflict by providing indication of evidence, not the evidence itself, to show it is worthy of judicial investigation by a trial so that the evidence supporting the conflicting assertions may be tested and weighed against each other.
- c* If a denial or conflicting assertion is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then it be rejected, thus rendering the issue sought to be raised not triable.

The Affidavit Evidence

- d* On their own the statements of the plaintiff in his affidavits in this case and in the appeal are no better or worse than the statements of Dato' Vijay Kumar in the letter's affidavits. All things being equal, it cannot be said in such a case that the plaintiff in this case has succeeded to show that the defendant plainly and obviously has no defence. Similarly Tetuan Kumar, Jaspal Quah & Aishah as plaintiff in the O. 14 application under appeal cannot say they have made out a plain and obvious case upon their statement in the affidavit alone.

- f* However, the statement by Dato' Vijay Kumar in his affidavit that the bill of costs was served upon the plaintiff on 8 December 2000 at 4.21pm is based upon a record in the relevant file, supported by the statutory declaration of Ho Kok Yew, the person who served the bill of costs upon the plaintiff, and who affirmed that although the file record was entered by Ms. Kasthuri, the latter would only record the date and time upon him dictating the same to her.
- g* A statutory declaration made under the Statutory Declarations Act has the same evidential value as an affidavit. Thus there is evidence of Ho Kok Yew on record. The affidavit of Dato' Vijay Kumar tells us not only who but also points to a file that could support his statement.

- h* On the other hand the affidavit of the Dato' Seri Peh Teck Quee offers no such support. By his statement in his affidavit Dato' Seri Peh Teck Quee only showed that he disagreed with the other party's version. But he failed to show in his affidavit who or what he could or would rely upon to support his version. While we know there are two and conflicting versions, Dato' Seri Peh Teck Quee has failed to show he has any kind of evidence against which the other party's version and evidence can be tested and measured.
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In para. 4 of his second affidavit in reply in this application, the plaintiff said that the bill of costs dated 13 March 2001 was not sent to him but to a company not related to him. But the bill is clearly addressed to the plaintiff, whereas the bill served in March 2001 was a bill to AA Synergy, a company of which the plaintiff is the sole beneficial owner. The letter of 22 September 1999, a personal memo of plaintiff and his cheque of 12 May 2000 (exh. VKN6) show that notwithstanding the bill was sent to AA Synergy there are also other dealings with the plaintiff addressed to him personally.

At para. 8 of encl. 8 the plaintiff made an allegation of backdating. But then again he failed to set out who or what could provide evidence of it. In so failing, he has failed to make out that the issue of backdating is worthy of judicial investigation.

The plaintiff had been given notice since 6 November 2001 that it is the defendant's case that the bill of costs had been served upon him on 8 December 2000. That this application under s. 128(1) is filed only after the one year had expired, ie, after 8 December 2001 serves to underline the need for him to give a some credible support to his statement in order to make out his case that there is a triable issue on the question of the date of service of the bill of costs. A trial is not ordered as an adventure that might enable a party to gain some evidence. He must show that he has some evidence to bring forth to justify a trial in order to test and weigh the relative merits.

It must be borne in mind that in this application under s. 128(1) by the plaintiff, the onus is upon the plaintiff to prove that the bill of costs was served in March 2001.

Even assuming that the plaintiff's assertion is accepted that the bill of costs was served in March 2001, s. 128(1) of the Legal Profession Act 1976 requires that after the expiration of six months from the delivery of the bill of costs, the applicant must prove to the satisfaction of the court that there are special circumstances to refer the bill to taxation. The usual onus therefore is on the applicant. Overcharging is always a special circumstance: *Re Robinson* [1867] 3 LR 4; *In re Boycott* [1885] 29 Ch D 571. In *Perusahaan Petanda Bintang Sdn Bhd v. Asbir, Hira Singh & Co* [1995] 3 CLJ 234 the learned judge accepted there was gross overcharging. If the ground for reference to taxation is overcharging, the applicant must show that there is overcharging, not merely assert his own view that he is overcharged. In this case there is no evidence adduced to prove and discharge the onus and burden that is upon an applicant to prove that there is that special circumstance, overcharging. The sum in the bill of costs is substantial. The matter involved is very substantial. The plaintiff

a did not discharge the burden upon him why the bill should be very much less, for example by showing that very little work in terms of effort, preparation and research is involved.

b It was also submitted that the application is not only made under s. 128(1) of the Legal Profession Act 1976, but also under the inherent jurisdiction of the court. Even assuming that notwithstanding the fact Parliament has specifically provided for the eventuality there is still an inherent jurisdiction, the discretion to apply the inherent jurisdiction of the court, is, like any other discretion, must be exercised judicially, and not at will. There must be good reason for its application. That reason must be compelling where Parliament by law has already made statutory provision, such as in this case. The plaintiff has in this case failed to give satisfactory reason why he was unable to apply within six months for the bill of costs to be taxed.

d Thus even if it is accepted that the bill of costs was served in March 2001, the plaintiff's application must still fail.

e In the O. 14 application under appeal, the onus to prove that the bill was served on 8 December 2000 is upon the plaintiff in that case: Tetuan Kumar, Jaspal Quah & Aishah. To that end Tetuan Kumar, Jaspal Quah & Aishah has shown it has the evidence of written records and of the persons involved to prove that the bill of costs was served on 8 December 2000 at 4.21pm as asserted by Dato' Vijay Kumar. On the other hand, the assertion by the defendant Dato' Seri Peh Teck Quee. Even though it is made in an application after more than a year, is only an assertion by him with no indication of likely evidence as would warrant a judicial investigation by way of a trial. Even assuming cross-examination in a trial does not cause him to change his testimony, weight of evidence is so obviously against his mere oral assertion that no useful purpose would be served by a trial but to delay judgment.

f For the above reasons the application in S3-24-171-2002 under s. 128(1) of the Legal Profession Act and the appeal from the decision of the learned senior assistant registrar in D3-22-315-2002 were dismissed, with costs in the former and no order as to costs in the latter as the same facts and legal groundwork is involved.

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